tiorari was filed on August 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act by suspending and discharging two of its employees for refusing to cross a lawful picket line established at its plant by employees working in another section of the plant.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 140, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provide as follows:

> Sec. 7. Employees shall have the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *

STATEMENT

Petitioner manufactures, sells and distributes biological and bacteriological media, materials and supplies (Pet. App. B 16). In early September 1967, the local UAW union which represents petitioner's pro-

duction and maintenance employees decided to strike.[1] It so notified the local of the Oil Workers Union, which represented petitioner's laboratory employees. On September 27, the Oil Workers called a meeting and advised its members of the impending strike. At this meeting, the Union's Secretary-Treasurer told the members that they were not required to cross the UAW picket line (A. 3-4; 23-25, 27-28[2]).

On the afternoon of October 12, UAW placed pickets around petitioner's plant, including the entrance used by the laboratory employees (A. 4; 25, 26-27, 38). That same day, Aaron Lane, Associate Director of the company's laboratories, called a meeting of the laboratory employees. He informed them that the strike was no excuse for not coming to work and that failure to report would result in "disciplinary action" (A. 5; 33-34). On the same date, notices carrying this message were posted on petitioner's bulletin boards (A. 5; 81).

At about noon on October 12, Oil Workers Steward David Murray, acting under direct instructions from the Union's Secretary to honor the picket line, left the plant without notifying management (A. 4-5; 32-36, 43). That evening he was informed by telegram that he had been suspended for leaving without notice or permission (A. 5; 80, 36, 29). The next morning,

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[1] The lawfulness of the strike—resulting from disagreements arising out of collective bargaining negotiations—has never been challenged by petitioner (Pet. 3; Pet. App. B 18, n. 3).

[2] "A." refers to the Appendix to the briefs below which is presently on file with the Clerk of this Court.

Friday, October 13, Murray returned to the plant, and, in his capacity as Union Steward, advised the laboratory employees that they did not have to cross the picket line (A. 5; 37-39).[3] Murray appeared at the picket line again on Monday; that evening he received a telegram from petitioner notifying him that his employment had been terminated (A. 6; 80, 40-41).

When employee Fosgate arrived for work on October 13, Murray told her she did not have to cross the picket line; she then went home (A. 6; 49). The following Monday or Tuesday Lane's secretary telephoned Fosgate and asked if she was coming to work. After being advised that the strike was still on, Fosgate replied that she "was not going to cross the picket lines" (A. 6; 50-51). On Wednesday, October 18, about one hour after the commencement of Fosgate's shift, she received a telephone call from Lane asking if she were going to report for work. On being assured that other employees were reporting, Fosgate replied that she would report if she could get a babysitter. Lane told her not to return his call since he was preparing to go home. (A. 6-7; 51-52.) Fosgate, unsuccessful in her efforts to obtain a babysitter, did not report to work that day. The following morning she telephoned Lane and explained why she had not reported (A. 7; 52-53). Lane responded that she "wasn't dependable," that

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[3] A substantial number of laboratory employees stayed out that day and the following Monday and Tuesday. Thereafter, all returned and continued to work throughout the strike. (A. 6, n. 7; 39-40, 76.)

they should "just call it off," and that her employment was terminated (A. 52-53).

The Board, affirming the trial examiner (Pet. App. B 15-32), found that petitioner discharged Murray and Fosgate because of their refusal to cross the UAW picket line, that such activity constituted concerted activity for mutual aid and protection within the meaning of Section 7 of the Act, and that therefore petitioner violated Section 8(a)(1) of the Act. The Board ordered petitioner to cease and desist from these unfair labor practices, to offer reinstatement to Murray and Fosgate, to make them whole for any lost earnings, and to post appropriate notices, *inter alia*, that petitioner will not "threaten or discipline employees for engaging in protected concerted activities" (Pet. App. B 13-14, 28-32).

The court of appeals enforced the Board's order. The court held that there was "substantial evidence from which the Board could have found that both discharges were directly related to these two employees' refusal to cross the United Automobile Workers picket line and that since [petitioner] was 'primary employer' of all of the employees involved, the discharges resulted from concerted activity protected by the N.L.R.A." (Pet. App. A 10).

ARGUMENT

The single issue raised by petitioner is whether the discharged employees were engaged in "concerted activity" protected by Section 7 of the Act (*supra*, p. 2) when they refused to cross the picket line. This basically factual question was resolved against peti-

tioner after a full administrative hearing (see Pet. App. B, 23) and the court of appeals found ample support for the Board's decision. As the court pointed out, the Board applied principles articulated by this Court in *Houston Contractors Association* v. *National Labor Relations Board*, 386 U.S. 664, 668-669, which were drawn from Judge Learned Hand's opinion for the Second Circuit in *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (C.A. 2). By assisting their fellow employees in refusing to cross the UAW picket line Murray and Fosgate were, in Judge Hand's words, assuring themselves "of the support of the one whom they [were] * * *, then helping; and the solidarity so established is 'mutual aid' in the most literal sense * * *" (130 F.2d at 505-506).

Contrary to petitioner's contention, the instant case is not controlled by *National Labor Relations Board* v. *Rockaway News Supply Co.*, 197 F. 2d 111 (C.A. 2), affirmed on other grounds, 345 U.S. 71. In that case the Second Circuit's conclusion that an employee's refusal to cross a picket line established by other employees amounted to an unprotected partial strike (197 F. 2d at 113-114) pertained to a picket line established at the premises of *another* employer.[4]

[4] Similarly inapposite are the cases relied upon by petitioner (Pet. 5) which involved situations where there was no evidence that the employees were acting in concert (*National Labor Relations Board* v. *Illinois Bell Tel. Co.*, 189 F. 2d 124 (C.A. 7), certiorari denied, 342 U.S. 885), or where certain employees refused to cross a picket line of an employer with whom they had no connection (*National Labor Relations Board* v. *L. G. Everist, Inc.*, 334 F. 2d 312 (C.A. 8)).

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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